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in the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-564

WELDON WATKINS and
CHRISTINE WATKINS,

Petitioners,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to ~~of the State of New York Court of Appeals, and/or~~ the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

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Respondent.

On Petition for Writ of Certiorari of the State of New York Court of Appeals, and/or the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

The Petitioners, Weldon Watkins and Christine Watkins, pray that this Court will issue its writ of certiorari to the State of New York Court of Appeals, and/or The Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

The decision sought to be reviewed is the New York State Court of Appeals refusing the granting of leave to appeal (July 6, 1978) (A. pg 57) the order of the Supreme Court of the State of New York Appellate Division, Second Judicial Department, affirming the conviction of the petitioners, WELDON WATKINS and CHRISTINE WATKINS. Said order being entered on June 26, 1978. (A. pg. 56)

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CITATION TO OPINION BELOW

At the time of this writing the only published opinion is the decision by the trial court on the supplementary pretrial motion. [89 Misc 2d 870, 393 N.Y.S. 2d 283 (1977)]. The Appendix to this petition contains all other opinions and decisions in their entirety.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C., Section 1257 (3) because the petitioners have been deprived of their Fourth, Fifth, Sixth and Fourteenth Amendment rights, through the decisions and judgments of the State of New York Court of Appeals, The Supreme Court of the State of New York, Appellate Division, Second Judicial Department and the Supreme Court of the State of New York for the Tenth Judicial District.

The decision on which review is sought was rendered by the highest Court of the State. All Appellate remedies of the state courts have been exhausted as to the questions presented herein.

QUESTIONS PRESENTED

1. Whether a defendant in a State Criminal Trial has a right, under the Fourth and Fourteenth Amendments to the United States Constitution, to a pre-trial hearing when the truthfulness of factual statements contained in an affidavit made in support of the issuance of an *ex-parte* eavesdropping order is properly challenged.

2. Whether the failure of a state trial court to hold a pre-trial hearing to determine the admissibility of the fruits of a wiretap seizure violates the defendant's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, when such hearing was properly demanded.

3. Whether the intentional withholding from the court issuing an eavedropping order of the fact that the executing authority during the course of the intercept knowingly intercepted and intentionally continued to intercept inter-spousal communications, violates the defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution.

4. Whether the intentional withholding of the known identities of the true targets of a gambling investigation by the applicants for an eavesdropping order from the issuing court violates the defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

The Federal questions were raised in these proceedings by pre-trial motions, during the course of the trial, the appellate briefs, the oral application for leave to appeal to the New York State Court of Appeals, the application to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department for a stay of execution of sentence pending a petition for a writ of certiorari to the United Staes Supreme Court, in an application for reargument to the New York Court of Appeals; and in an application to the United States Supreme Court for a Stay of Execution of the sentence pending the determination of this petition (Marshall, J. denied 8-2-78).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions and statutes are set forth in their entirety in the Appendix hereto:

Fourth Amendment to the United States Constitution (A.80)

Fifth Amendment to the United States Constitution (A.80)

Sixth Amendment to the United States Constitution (A.80)

Fourteenth Amendement to the United States Constitution (A.80)

Title 18 United States Code, Section 2518 (A.81)

New York Criminal Procedure Law Section 700.20 (A.87)

New York Criminal Procedure Law Section 700.30 (A.88)

New,York Criminal Procedure Law Section 700.50 (A.89)

New York Criminal Procedure Law Section 710.60 (A.90)

STATEMENT OF THE CASE

This was a criminal proceeding commenced in 1976 against the petitioners WELDON WATKINS and CHRISTINE WATKINS (et al) for violations of Sections 225.10, 225.20 and 105.05 of the New York State Penal Law. The nature of the charges were promoting gambling and possession of gambling records as a felony, and conspiracy as a misdemeanor. After a jury trial the petitioner WELDON WATKINS was convicted of promoting gambling and the petitioner, CHRISTINE WATKINS, of promoting gambling and possession of gambling records.

The arrest came as a result of the fruits of a wiretap order issued against a Willie J.Clark. The truthfulness of the affidavit in support of the wiretap order was challenged by pre-trial motions (A.1,57) The trial court failed to hold pre-trial hearings although they were properly requested in accordance with New York law. [Section 710.60, (4), Criminal Procedure Law of the state of New York].

The trial Court determined the admissibility question without ever hearing the contents of the tape recordings of the wiretap or without ever viewing the transcript of the tape recordings.

The petitioner, WELDON WATKINS, was sentenced to one year incarceration in the County jail and the petitioner, CHRISTINE WATKINS, to five years probation.

The trial court's actions were sustained in the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, (A.68). Leave to appeal to the New York State Court of Appeals was denied. (A.70).

Motion for reargument to the Court of Appeals was denied on July 28, 1978.

Motion for stay of execution of sentence pending a petition to this Court was denied by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (A.71).

A motion to this court for a stay of execution was denied on August 2, 1978 (Marshall, J.). (A.73).

REASONS FOR GRANTING THE WRIT

I.

This Court on June 26, 1978 [*Franks v. Delaware*, ____U.S.____, ___S. Ct. ____, ___L. Ed. 2d____, 46 L. W. 4869, No. 77-5176], held that the Fourth Amendment to the United States Constitution requires a state to grant a defendant an opportunity to a hearing when the defendant properly challenges the truthfulness of statements contained in an affidavit in support of an ex-parte search warrant.

New York State's highest court [*People v. Alfinito*, 16 N.Y. 2d 181; 264 N.Y.S. 2d 243; 211 N.E. 2d 644, 1965] has

also held that the hearing alluded to in *Franks v. Delaware*, [supra], is mandatory.

The New York State Criminal Procedure Law [Section 710.60,4.] (A. 100) uses the word "must" when referring to pre-trial suppression hearings.

In spite of the Legislative and Judicial mandates in this area the petitioners were denied a hearing after sufficiently and properly attacking the truthfulness of statements contained in an application for an ex-parte eavesdropping order (A.62).

It is submitted that the failure of the trial court to hold the pre-trial hearing violated the petitioners' rights under the Fourth and Fourteenth Amendments to the United States Constitution.

The reason why this Honorable Court should hear this case is that while *Franks v. Delaware*, [supra], *People v. Alfinito* [supra] and the New York Statute [supra], all speak of search warrants, a logical extension of the case doctrines would be to extend the protection to any ex-parte application in which the truthfulness of the allegations contained in the application seeking such order is properly challenged. In the case at bar we argue that the Fourth Amendment applies with equal thrust to applications for *ex parte* eavesdropping warrants as it applies to search warrants.

II

The petitioners herein by pre-trial motions (A.1,57) moved to suppress the fruits of the seizure made pursuant to the wiretap order. Although New York Law [Section

710.60 (4)] provides for a pre-trial hearing to determine the admissibility of the seizure, the trial court failed to determine the admissibility questions at a pre-trial hearing.

It is submitted that the failure to hold the pre-trial admissibility hearing violated the petitioners' due process rights under both Federal and State law.

By leaving the admissibility questions until the trial, in order to contest the admissibility the petitioners would have been required to take the stand and testify in front of the jury in violation of their Fifth Amendment rights to remain silent. [Fifth Amendment to the United States Constitution, A.94]. The denial of the admissibility hearing also deprived the petitioners of the effective assistance of counsel [Sixth Amendment to the United States Constitution, A. 94], in that counsel was prohibited from attacking the admissibility of the seizure unless he chose to waive the petitioners' right to remain silent.

It is respectfully submitted that due process prohibits a petitioner from being required to testify on his own behalf in front of a jury to challenge the admissibility of evidence when a proper vehicle for such challenge is provided for by statute and such mandate is ignored by a trial court.

III

It is respectfully submitted that the trial court erred in failing to suppress the evidence seized on the ground that the executing authority [The Special Investigations Squad of the Suffolk County Police Department working under the direction of the Suffolk County District Attorney's Rackets Bureau] intentionally seized privileged communications in violation of the eavesdropping order (A.1,50).

The New York Statute [Criminal Procedure Law of the State of New York, Section 700.20 (2)(c) (A.100)] has a stricter minimization requirement than the Federal Statute. [18 United States Code, Section 2518, (A.96)] in that the application for a state eavesdropping warrant must contain "a statement that such communications (to be intercepted) are not legally privileged."

The executing authority had knowledge of the marital relationship of the parties prior to the application for the eavesdropping order [Trial Transcript p. 73, Morro; p. 166, 168, 200, Cseh, (A. 76, 85, 86, 90)].

The petitioners' voices were instantly recognized by each monitoring police officer [Trial Transcript p. 61, 66, Morro; 87, 88, 90, 98, Hoge; 98, 99, 143, et seq Cseh (A. 74, 75, 77-84) incl.], when they appeared on the wiretap monitor. The petitioners' voices were checked prior to the execution of the order [Trial Transcript p. 188, 190 (A. 86, 87)].

The logical conclusion from the police actions is that they knew that the petitioners' voices would appear on the wiretap.

The intentional failure of the executing authority to notify the issuing authority (Stark, J., A. 1,50)of the probability of privileged communications being intercepted denied the issuing courts of the right to set standards or request periodic reports on the status of the wiretap. The police actions were violative of New York Statutory Law [Criminal Procedure Law of the State of New York, Section 700.30 and 700.50 (A. 100)].

Justice Marshall in his learned dissent in United States v. Donovan [429 U.S. 413, 97 S. Ct. 658, 50 L. Ed. 2d 652] stated that an intentional and flagrant violation of a criminal statute cannot be tolerated.

What occurred in the case at bar, is the executing authority deliberately substituted its own judgment as to what might or might not be a privileged communication for that of the judiciary. This cannot be tolerated.

The trial court herein compounded the error by failing to listen to the contents of the seizure prior to its ruling that the evidence was admissible. Thus the Court supported the proposition that the fruits of a seizure justify the means employed to obtain them.

This proposition along with the intentional usurpation of judicial power by the executing authority violates the petitioners' rights under the Fourth and Fourteenth Amendments to the United States Constitution [supra].

IV

This Court has held that the unintentional failure to name a target in an application for an eavesdropping order would not be fatal to the validity of such order [United States v. Donovan, supra]. This Court has further held that failure to name the target would not be fatal if the order would have been issued had the target been named. [Scott v. United States, ____U.S.____,____S. Ct.____, 57 L. Ed. 2d 65; 46 L.W. 4433, decided May 15, 1978]

However, the question arises, does the intentional witholding of the identity of the true target of an eavesdropping order from the issuing court invalidate the order? It is submitted that the order should be invalidated, not because there may or may not have been probable cause for the issuance of the order but because we cannot tolerate deliberate violation of our penal statutes by our law enforcement officials.

This Court is respectfully referred to both the majority and dissenting opinions of United States v. Donovan [supra].

The majority stated:

> "There is no suggestion in this case that the government agents *knowingly* failed to identify respondents...for the purpose of keeping relevant information from the District Court that might have prompted the Court to conclude that probable cause was lacking. *If such showing had been made we would have a different case.*"

97 S. Ct., p. 672, N. 23 (emphasis added)

Justice Marshall in his dissent likewise stated the following:

> "The Court's opinion implies that if the violations of Title III considered here had been intentional the result would be different. Ante at 671-672, N 23, 673 N26. This must be so for surely this Court would not tolerate the Government's intentional disregard of duties imposed by Congress"

97 S. Ct., at 679.

It is respectfully submitted that the omission of the petitioners names from the applications for the eavesdropping warrant was intentional in this case.

The trial testimony clearly indicates that the true targets were the petitioners herein, as follows:

"The Court: When did either of them (Weldon Watkins, Christine Watkins) become a target of your investigation?"

"The Witness: (Detective Cseh) When I was aware that Willie Clark—a policy operation was going on at Willie Clark's house, I knew—I figured that Weldon Watkins would be involved because I had known that Willie Clark worked for Weldon Watkins"

(Trial Transcript .271, 272) [A.91]

Obviously this knowledge existed prior to the application for the eavesdropping order since he had to know Willie Clark was conducting an operation prior to the making of his affidavit.

In his summation, the trial prosecutor reinforced the fact that it was Watkins and not Clark who was the actual target of the investigation as follows:

"I submit to you that every penny of the $2,300. was controlled by Weldon Watkins not by Willie Clark. *He (Clark) was a little fish who added up the numbers. (It was Watkins) who ran the operations.*"

(emphasis added)

(Trial Transcript . 375) [A. 92)]

Upon cross-examination it became crystal clear that Detective Cseh fully expected the voices of both petitioners to appear on the interception as follows:

"Q. Let me ask you this: You said you spoke to Mr. Watkins on the telephone a number of times?"

"A. That's correct"

"Q. The date in question is October 8, 1976, correct?"

"A. That I spoke to him on the telephone?"

"Q. No the date of the arrest."

"A. That's correct."

"Q. How long prior to that date was the last time you spoke to him on the telephone?"

"A. Approximately—Well in between a week and a half to three weeks prior to that."

(Note, surveillance began October 4, 1976 and ended October 8, 1976)

"Q. And what was that conversation in relation to?"

"A. I had called Trailer Time."

"Q. For what purpose?"

"A. To speak to him to—under a ruse of buying a trailer, some equipment."

(A. 73)

"Q. And what was the purpose of that call?"

"A. To further substantiate that I knew the voice to be Weldon Watkins."
(A.87, 88)

Detective Cseh's actions show beyond a doubt that Christine Watkins was also a target as follows:

"Q. Let me ask you this: have you ever spoken to Christine Watkins on the phone?"

"A. Yes, I have."

"Q. When was the last time prior to October 8, 1976 that you spoke with Christine?"

"A. It was approximately the same time as I made the phone call to Weldon Watkins. In—within a day or two of that time."

"Q. And where did you call Christine Watkins?"

"A. At her home." (A. 89)

Cross-examination further developed that Detective Cseh knew of prior arrests and convictions for gambling for both appellants and their prior involvement in gambling activities at the time of the initial investigation as follows:

"The Court: Well sir, isn't it a fact that you knew at the time you were investigating this case that Mr. Watkins had been in gambling activities before?"

"A. Yes Sir, I did."

"Q. The Court: And that Mrs. Watkins had been in gambling activity before?"

"A. Yes Sir, I did." (A. 84, 85)

It is respectfully submitted that from the quoted testimony it is clear Detective Cseh knew of the involvement of the appellants with Willie Clark prior to submission of the application for the eavesdropping order. He called both petitioners prior to the execution of the eavesdropping order so he could identify their voices *when* they appeared on the surveillance monitor and he knew of the prior gambling activities of the petitioners. It is clear that he failed to name either petitioner in his application and did not make any interim reports to the issuing justice. Thus, his exclusion of the names of both petitioners must be concluded to be intentional.

By the intentional omission of the petitioners' names in the affidavit, the issuing Court was unable to determine the identity of the true targets of the investigation prior to issuance of the order. The Court also was denied meaningful control or supervision over the execution of the order, and the right to determine if probable cause existed as to the petitioners and what investigative procedures, if any, would be explored prior to utilizing the drastic device of electronic surveillance. Finally, the court was denied the control necessary to insure that the petitioners due process rights were protected.

Criminal Procedure Law, Section 700.20 (2) (b) (iv) [New York Criminal Procedure Law, Article 700, McKinney's 1971] states that an application for an eavesdropping order must include:

"(iv) The identity of the person, if known, committing such designated offense and whose communications are to be intercepted."

New York State wiretap orders must conform to the detailed requirements of Title III. [Omnibus Crime Control and Safe Streets Act of 1968; 18 USC, Sections 2510-2520, originally enacted as act of June 19, 1968, Public Law 90-351, Sections 802, 82 Stat. 212; hereinafter referred to as Title III]. The interpretation of the Federal requirements are mere minimum standards and state statutes can be more stringent than Title III. [Senate report No. 1097, note 34 at 2187; Senate Report No. 1097, 90 Congress 2nd Session; 1968 US Code Cong & Ad News 2180; Commonwealth v. Vitello, (Mass.) 327 NE 2d 819, 833 (1975); State v. Maloof (RI), 333 A 2d 676, 681 (1975]

In fact, New York State requires Article 700 C.P.L. to be strictly construed. [People v. Sher, 38 NY 2d 600, 1976, 381 S. 2d, 843, 345 N.E. 2, 314; People v. Nicolette, 34 NY 2d 249, 1974, 356 S. 2d 855, 313 N.E. 2, 336; People v. Szymanski, 62 Misc. 2d 1065, 1970, 310 S. 2d 587]

While all states are bound by constitutional requirements, the individual states are free to enact stricter standards than those imposed by Congress. [James G. Carr, "The Law of Electronic Surveillance", Clark, Boardman Company; NY 1977, p. 190-191].

Thus, at the very least, the case at bar must be removed from the aegis of Donovan [supra] because in the case at bar, *the failure to name the petitioners was intentional.*

Furthermore, but arguendo only, should it somehow be concluded that the omission of the petitioners names

from the application for the eavesdropping order was unintentional then it should not further be concluded that the New York State Legislature was acting under the same state of mind as the Supreme Court believed the United States Congress was when enacting Title III.

This Court is respectfully urged to note that the New York legislature had the benefit of the Federal statute prior to enacting Article 700 C.P.L. and as late as 1976 concluded that Article 700 must be strictly construed. [*People v. Sher*, supra]. Unlike the Federal Congress, the New York Court of Appeals, had benefit of the Supreme Court's decisions in Kahn and Chavez, [United States v. Kahn, 415 U.S. 143, 94 S. Ct. 977, 39 L. Ed. 2d 225; United States v. Chavez, 416 U.S. 562, 94 S. Ct. 1849, 40 L. Ed. 2d 380] before promulgating the state statute. A state may apply stricter standards than the Federal Government in determining what acts are to be prohibited; it should not be assumed that New York acted in ignorance or in a vacuum.

A vital factual distinction herein is that in *Donovan*, [supra], the identities were learned subsequent to issuance of a valid wiretap order and the failure to identify arose during the extension of that order. In the case at bar the true targets were neither named nor otherwise identified in the original order although they were known before application was made for such original order.

Paraphrasing the language in *Kahn*, [*United States v. Kahn*, supra] the government is required to identify an individual in an application for an eavesdropping warrant if it has probable cause to believe, first, that the individual is engaged in the criminal activity under investigation, and second, his conversation will be intercepted over the target telephone.

This *de minimus* probable cause standard for eavesdropping warrants is clearly met in the case at bar. Det. Cseh knew of the petitioners' involvement with the Clark operation and he telephoned each of the petitioners prior to the institution of the surveillance to identify their voices. Thus it can only be concluded from Det. Cseh's actions that the individuals conversations would be intercepted over the target telephone.

Thus, it is respectfully submitted that this Court should grant the Writ of Certiorari so it can be expand on its "intentional omission to pry" and set guidelines as to what is an intentional omission and what sanctions will be imposed for an "intentional omission."

CONCLUSION

Petitioners, WELDON WATKINS and CHRISTINE WATKINS, respectfully request this Honorable Court to grant a Petition for Writ of Certiorari to the State of New York Court of Appeals and/or the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

Respectfully submitted,

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by: /s/_____
STANLEY L. SHAPIRO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to the Honorable Patrick Henry, District Attorney of Suffolk County, Criminal Courts Building, Center Drive South, Riverhead, New York 11901; and I also certify a true and correct copy of the above and foregoing was mailed to the Honorable Sol Wachtler, Associate Judge, State of New York Court of Appeals.

By: /s/_____
STANLEY L. SHAPIRO